No. 803

In the Supreme Court of the United States

OCTOBER TERM, 1941

STEUART PURCELL, EDMUND H. BUDNITZ, AND ARTHUR H. BRICE, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA, THE CONFLUENCE AND OAKLAND RAILROAD COMPANY ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

INDEX

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OPINION BELOW

The opinion of the District Court (R. 43) is reported in 41 F. Supp. 309. The reports of the Interstate Commerce Commission (R. 20, 31) are published in 244 I. C. C. 451 and 247 I. C. C. 399.

JURISDICTION

The final order of the District Court was entered October 13, 1941 (R. 53). The petition for appeal was filed on November 5, 1941 (R. 53–54), and was allowed on November 5, 1941 (R. 54–55). Juris-

diction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 219–221 (U. S. C., title 28, secs. 47, 47a), and under section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936 (U. S. C., title 28, sec. 345). Probable jurisdiction was noted on January 5, 1942 (R. 60).

QUESTION PRESENTED

The United States in carrying out a flood-control project was about to acquire, by purchase or condemnation, land on which was located a branch line of railroad. Completion of the project would flood a part of the line so as to make abandonment of the whole inevitable. The branch had in the past produced profits for the system of which it was part, but relocation in order to preserve existing service could be effected only at a cost greatly disproportionate to revenue of the branch and to public need for the service. The Interstate Commerce Commission authorized abandonment of the line without requiring relocation. The question is whether the Commission erred in disregarding the prospect that the Government would pay the cost of relocation with the consequence that the railroad would not have to bear an unreasonable financial burden in continuing transportation on the branch.

STATUTES INVOLVED

The relevant provisions of the Interstate Commerce Act and of the Act of June 28, 1938, 52 Stat.

1215–1216, are set forth in the Appendix, *infra*, pp. 32–35.

STATEMENT

On January 15, 1940, the Confluence and Oakland Railroad Company and the Baltimore and Ohio Railroad Company applied jointly to the Interstate Commerce Commission for an authorization to the former to abandon, and to the latter to abandon operation of, a branch line of railroad extending from Confluence and Oakland Junction, Pennsylvania, south to Kendall, Maryland. The application was opposed by the Public Service Commission of Maryland, and protests were filed by local interests (R. 21). The facts are not in dispute and the circumstances surrounding the application may be summarized from the Commission's findings.[1]

The Confluence and Oakland Railroad Company owned the line of railroad which was the subject of this application. In 1890 the Baltimore and Ohio Railroad Company, which held all of the outstanding stock of the Confluence and Oakland, leased the property for a term of 999 years. (R. 21.)

The line, approximately 19.79 miles in length, runs through a semimountainous section of southwestern Pennsylvania and western Maryland, following generally the course of the Youghiogheny River; it connects with the main line of the Balti-

[1] The report of the full Commission on reargument (R. 32) adopted the findings made by Division 4 (R. 21–26).

more and Ohio at Confluence and Oakland Junction, Pennsylvania (R. 21). There are eleven stations along the line, the largest of which are Somerfield, Pennsylvania, and Friendsville, Maryland, with populations of 250 and 600, respectively. The total population embraced within an area of one-half mile on both sides of the road throughout its length is estimated to be 2,000.

In the territory served by the railroad, farming is carried on to a limited extent, while lumbering, which flourished at one time, has largely disappeared because of the depletion of standing timber. All coal mines formerly operating along the line have been abandoned except one which is operated by McCullough Coal Corporation, a protestant before the Commission and one of the appellants here. This mine is located between Friendsville and Kendall, and is the only industry of importance in the area. (R. 22.)

United States Highway 40 and a paved state highway cross the railroad at Somerfield and at Friendsville, respectively. Improved state highways parallel the line at a substantial distance on each side. Secondary roads traverse the area, affording connections with these highways. No common-carrier bus or truck service operates in the immediate territory except at Friendsville, which is served by a truck line operating out of Cumberland, Maryland. Deliveries are made to all points, however, by local and private trucks op-

erating mainly from Confluence and Somerfield. (R. 22.)

In recent years train service over the line has consisted of a mixed train in each direction on Tuesdays and Saturdays, operating from Rockwood, Maryland, a point on the main line about ten miles east of Confluence and Oakland Junction, Pennsylvania (R. 22). The Commission made detailed findings as to the volume of traffic, operating cost, and revenues attributable to the operation of the line for the years 1934 to 1939, inclusive (R. 22–24). During that period the average annual traffic on the line was 390 passengers, 670 carloads of freight, and 360 tons of freight in less-than-carload lots.[2] The average annual gross revenue was $51,571 (R. 32). Considered independently, the branch railroad operated at a loss; but system profits from line traffic more than offset this loss, leaving an average annual net profit to the carriers of from $1,125 to $23,781, depending upon the operating ratio applied in estimating system cost of handling traffic which originated at or was destined to points on the line.[3]

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[2] These averages are computed by combining in-bound and out-bound traffic as shown in the report of Division 4 (R. 22–23). All freight was interline freight; no local freight was carried (R. 22).

[3] It was found that the annual system profits from operation of the line during this six-year period averaged (1) $1,125 if, as proposed by the carriers, use was made of ratios of system cost (of handling traffic originating at or destined to points on this line) to revenues therefrom ranging from

Division 4, in its report of March 6, 1941, found that within one year further operation over the present line must cease because of construction by the federal Government of a dam across the Youghiogheny River at a point on the line about one mile above Confluence and Oakland Junction, Pennsylvania (R. 27–28). The reservoir to be created by the dam will inundate approximately twelve miles of the line, from the dam site to a point upstream near Friendsville, Maryland. Beyond the high-water mark, the six miles of line farthest from the junction will be isolated and rendered inoperable, leaving usable only the one-mile segment below the dam (R. 24–25).

The United States, acting through the War Department, elected to exercise an option which it had obtained to purchase the portion of the line to be flooded for an agreed price of $306,000 and salvage rights (estimated at $25,965),[4] subject to the Interstate Commerce Commission's approval of the application by the railroad to abandon. If

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73.14 percent to 77.93 percent (described as the operating ratio), (2) about $23,781 if a 25-percent operating ratio, advanced by appellants, was used, (3) $12,395 if a 50-percent operating ratio, frequently used in cases presenting the present type of allocation problem, was used (R. 23–24, 26).

[4] As of December 31, 1936, the original cost to that date of the property, exclusive of land and assessments for improvements, was $398,873; and as of the same date the cost of reproduction, less depreciation, and the value of land and rights in land were reported by the Commission's Bureau of Valuation to have been $350,674 and $8,717, respectively (R. 21–22).

it should prove impossible to consummate the agreement, the property would be taken by condemnation. (R. 25.)

The coal mine of McCullough Corporation is situated above the projected reservoir and will not be flooded. However, inundation of the Confluence and Oakland Railroad will cut off all rail service to the mine and would require the company to transport its coal by motor trucks between the mine and the nearest railhead, at a cost of $1.12 per ton; under such circumstances McCullough would be forced to cease operations because of inability to compete with other mines more favorably located. (R. 26.) Since the mine will not be flooded by the reservoir, the United States will not compensate the coal company by acquiring its property, either through purchase or condemnation (R. 35).

In the past practically the entire production of the McCullough mine has been shipped by rail to nearby eastern points. Its shipments of coal have been the major source of revenue to the Confluence and Oakland line, averaging 27,211 tons annually during the period 1921 to 1933 and 22,386 tons during the period 1934 to 1939. (R. 26.) In opposing the application for abandonment, McCullough presented testimony that a relocated line of railroad sufficient to carry the present

[1] Varying estimates of the value of the company's property were given by witnesses in the District Court; the largest of these estimates was $308,262.13 (R. 46).

traffic could be constructed for approximately $800,000. Applicant carriers and the War Department presented four estimates ranging from $2,018,000 to $2,519,000. The applicants also showed that normal maintenance expenses on the new road would be annually about $8,000 greater than similar charges have been on the present line, and that an additional expenditure of $8,000 per year for five years would be required while the roadbed underwent seasoning. (R. 25.) Protestants' estimated maintenance expenses for the line were even higher (R. 26).

After hearing before a trial examiner of the Interstate Commerce Commission, a proposed report was submitted by the examiner recommending that the application for abandonment be denied (R. 11–20). Division 4 of the Commission, however, ruled that the public convenience and necessity would permit abandonment and that relocation was not required, since the cost of relocating the line, whether borne by the carriers or by the Government as condemnor, was disproportionately large in relation to the value of the transportation performed to warrant ordering a continuation of that service (R. 20–29). On reargument before the full Commission, the decision of Division 4 was affirmed, the Chairman and two Commissioners dissenting (R. 31–38).

Subsequently, the Public Service Commission of Maryland and McCullough Coal Corporation filed a complaint against the United States and the two

railroad companies in the District Court of the United States for the District of Maryland (R. 1). The bill prayed that the order of the Commission granting the carriers' application be set aside and annulled (R. 10). The Interstate Commerce Commission intervened as a party defendant (R. 39). A three-judge statutory court was convened to hear the case on October 1, 1941 (R. 43). The District Court filed its opinion October 13, 1941 (R. 43–52), and on the same day decreed dismissal of the complaint (R. 53).

SUMMARY OF ARGUMENT

I

Where there is no physically possible alternative to abandonment of a present line of railroad, the Interstate Commerce Commission is authorized to order relocation if preservation of the existing service is required by the public convenience and necessity. In such a case the Commission properly considers the cost of relocation in determining on an application for abandonment whether to grant unconditional authority to abandon under section 1 (18) of the Interstate Commerce Act. The granting of such a certificate is proper when the cost of relocation is too heavy and operation of the relocated line will prove too severe a drain on the carrier to be warranted by the public advantages of continuation of the service; this is a ques-

tion for the judgment of the Commission upon a consideration of all the factors.

II

The cost of relocating the Confluence and Oakland Railroad has been estimated between $800,000 and $2,500,000. If the lowest figure be taken, and if it be assumed that conditions of traffic on the railroad remain approximately constant, it is clear that the net profits to be derived, even if estimated according to the operating ratio contended for by McCullough, would give less than a 3% return on the capital invested. If, as is more probable, the cost should come to $1,500,000 and the income amount to only about $12,000, the rate of return would be .8%. In either case the return would be clearly insufficient to pay carrying charges on the capital hypothetically invested, if financing were possible at all. In view of the admitted increase in operating expenses over a relocated line, it is entirely probable that the road would have no profit, but would instead operate at a loss. Against these considerations the balance of advantages to be gained from operation of a relocated line of the branch railroad is plainly uneven, and the Interstate Commerce Commission correctly granted a certificate unconditionally authorizing abandonment.

III

The fact that the cost of relocation may be borne by the Government, as a part of the expense of acquiring the land on which the present Confluence and Oakland line is situated, does not alter the propriety of granting unconditional authority to abandon. The United States is not required to pay the cost of relocation of the railroad unless the line is in fact relocated, and relocation will not be effected unless required by public authorities. Accordingly, it should not be assumed in the abandonment proceeding that the Government will bear the cost of relocation; rather, the Commission should consider the application for abandonment without regard to the source of capital for relocating the line. Only if it should decide independently that the public convenience and necessity required relocation ought the Government appropriation for defraying the cost to become significant and applicable. Financial strain upon the applying carriers is not the sole standard by which to measure considerations favoring abandonment. Economically wasteful railroad operations do not serve the public convenience and necessity, and the Interstate Commerce Commission is not required to order their continuance or initial undertaking. Instead the Commission properly authorizes abandonment of such transportation service.

ARGUMENT

I

WHERE RELOCATION OF A LINE OF RAILROAD THAT MUST BE ABANDONED IS TOO COSTLY TO BE ECONOMICALLY JUSTIFIABLE THE INTERSTATE COMMERCE COMMISSION MAY AUTHORIZE ABANDONMENT WITHOUT RELOCATION

Section 1 (18) of the Interstate Commerce Act prohibits carriers by railroad from abandoning a line without having first obtained a certificate of public convenience and necessity from the Interstate Commerce Commission. Section 1 (20) authorizes the issuance of certificates by the Commission, with such conditions attached as the public convenience and necessity require. In some cases the Commission has employed this power of attaching conditions for the purpose of ordering a relocation of the line abandoned. *St. Louis-San Francisco R. R.*, 244 I. C. C. 485; *Union Pacific R. R.*, 228 I. C. C. 540; *Baltimore & Ohio R. R.*, 217 I. C. C. 456; *Baltimore & Ohio R. R.*, 207 I. C. C. 284. In other cases the Commission has authorized abandonment without requiring relocation. *Southern Ry.*, 217 I. C. C. 764; *Los Angeles & S. L. R. R.*, 212 I. C. C. 597; *Boston & Albany R. R.*, 202 I. C. C. 555.

In the present type of situation, where continued operation of the old line will shortly become a physical impossibility, this power to condition might prove ineffective. If the carrier should

elect to discontinue operations on the line after the land has been taken by eminent domain without applying to the Commission for authority to abandon, it is possible that proceedings could be instituted against the railroad under section 1 (20) of the Interstate Commerce Act on the theory that no abandonment of a transportation *service* as distinguished from a *line* of railroad was lawful in the absence of a certificate; that condemnation would be a defense only to abandonment of a particular line. However, if the sanctions contained in section 1 (20) should be held not available, independent authority in the Commission to order relocation is probably contained in section 1 (21) of the Act; the statute there empowers the Commission, upon complaint or upon its own initiative, to authorize or require a railroad to extend its line or lines, provided that the extension is reasonably required in the interest of public convenience and necessity and that the expense to the carrier will not impair its ability to serve the public. While that section does not authorize the Commission to order a major extension through territory not previously served, its scope is not confined to spur, switching, industrial, and side tracks, but probably comprehends relocation of lines rendering existing service. *I. C. C.* v. *Oregon-Washington R. R. & Nav. Co.*, 288 U. S. 14, 38–39, 40.[8]

[8] Appellants have not raised in this case the question of the Commission's power to order relocation. Indeed their case depends upon its existence; if the Commission could not re-

Where, however, the railroad in a situation like that of the present case chooses to apply to the Commission for authority to abandon a particular line, the Commission is, in effect, called upon then to decide whether the alternative to abandonment of the service—relocation—is required by the public convenience and necessity.

The dissenting Commissioners expressed the view that this problem was not then before the Interstate Commerce Commission (R. 38). They reasoned that in the absence of the Government's flood control program with the projected use of the Youghiegheny River basin as a reservoir there would be no presently existing ground for granting the railroads' application to abandon the Confluence and Oakland branch. This much may be conceded for the purposes of the present litigation. They then urge that the Commission should grant no certificate of abandonment, and should not consider the question of relocation until the United States has taken the railroad land by eminent domain. Such a procedure absolutely requires the Government to resort to a condemnation suit and incur its attendant expenses, when acquisition of

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quire relocation of the Confluence and Oakland, the carriers would eventually abandon the present line without having secured a formal authorization, and appellants would be wholly without remedy. The only practical difference between such a procedure and that of first obtaining a certificate is that nonauthorized abandonment would have to be preceded by condemnation and not a mere sale to the United States.

the property in that manner may prove to have been needless, if relocation of the line condemned is not later decreed by the Commission.

In addition to the undesirability of multiplying litigation and of increasing the cost to the United States of acquiring land for public use, other considerations persuade against accepting the minority view that the Commission should close its eyes to future impossibility of operation on the branch line until the impossibility has become effective. In the eminent domain proceeding contemplated by the dissenting Commissioners it would not be possible to fix the total award until the question of relocation had been finally determined; if no allowance were made for the expense of relocating a railroad and the Commission later ordered relocaton, the carrier would be seriously burdened and might then be unable to secure full compensation. If on the other hand the condemnation award included an amount for relocation damages and the Commission subsequently authorized abandonment of the branch line service without relocation, the railroad would be unjustly enriched. Cf. *United States Feldspar Corp.* v. *United States*, 38 F. (2d) 91 (N. D. N. Y.).[1]

[1] There a state authority condemned the portion of a branch road nearest to its main line connection, leaving the end portion isolated. In order to avoid the delay of an appeal, the authority paid an award sufficient to absorb the cost of relocation. Subsequently the Interstate Commerce Commission authorized abandonment of the branch without requiring relocation. A bill in equity to enjoin enforcement

While this difficulty could be alleviated procedurally through postponing the final award, since the United States may acquire title to land at the time when a declaration of taking is filed and before compensation is awarded,[8] it would be generally impossible as a practical matter under the minority Commissioners' view for the railroad ever to effect relocation before service on the old line had been interrupted; instead, a substantial interval with no service is probable, which would be certainly very injurious to shippers in McCullough's position. And under this view the making and execution of agreements by the Government or a governmental agency with the carrier to construct a relocated line which should be ready by the time when the old branch is abandoned would be rendered impractical. Cf., *e. g., Union Pacific R. R.*, 228 I. C. C. 540; *Baltimore & Ohio R. R.*, 207 I. C. C. 281. In the past, the Commission through its Division 4 has consistently considered and acted affirmatively on applications for abandonment where an operation of line would soon have to cease because of the Government's clear purpose to condemn.[9] Accordingly, we think that the majority of the Commission was clearly right in entertaining the railroad's ap-

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of the order granting the certificate was brought by a company situated analogously as McCullough Coal Corporation here; it was dismissed by the District Court.

[8] Act of February 26, 1931, c. 307, 46 Stat. 1421.

[9] See cases cited at p. 12 *supra*.

plication and authorizing an abandonment which was inevitable. There remains the principal question, whether relocation should have been contemporaneously ordered.

The statutory standard set to guide the Commission in passing on an application for unconditional abandonment is formed by the requirements of the public convenience and necessity. Determination requires a balancing of interests by the Commission in each case. Mr. Justice Brandeis, speaking for the Court, said in *Colorado* v. *United States*, 271 U. S. 153:

> While the constitutional basis of authority to issue the certificate of abandonment is the power of Congress to regulate interstate commerce, the Act does not make issuance of the certificate conditional upon a finding that continued operation will result in discrimination against interstate commerce, or that it will result in a denial of just compensation for use in intrastate commerce of the property of the carrier within the State, or that it will result in a denial of such compensation for the property within the State used in commerce intrastate and interstate. The sole test prescribed is that abandonment be consistent with public necessity and convenience. In determining whether it is, the Commission must have regard to the needs of both intrastate and interstate commerce. For it was a purpose of Transportation Act, 1920, to establish and maintain adequate service for both. * * * The benefit to one of the abandonment must be weighed against the inconvenience and loss to which the other

> will thereby be subjected. Conversely, the benefits to particular communities and commerce of continued operation must be weighed against the burden thereby imposed upon other commerce. * * * The result of this weighing—the judgment of the Commission—is expressed by its order granting or denying the certificate. [271 U. S. 167–168.]

From this statement it is plain that no one element of disadvantage in continuance of service is essential to authorize abandonment; a particular disadvantage may, however, be determinative, depending upon the opposing considerations. Clearly the burden of continuing future deficits from operation or of heavy expenditure required to preserve existing service would be sufficient for abandonment if the benefits of and public need for continued operation were not great; the Commission would not be required to find before authorizing abandonment that continuance would result in a discrimination against interstate commerce or would prevent the railroad from earning a fair return on its whole property.

The necessity for a large capital outlay by a carrier to continue operating a branch line has been held a sufficient ground for authorizing abandonment. *Transit Commission* v. *United States*, 284 U. S. 360. There the Long Island Railroad had been ordered by a state commission to eliminate the grade crossings on a branch of its railroad less than five miles long. These improvements would

cost approximately $4,000,000; of this sum the company would be obliged to pay half, which it might borrow from the state at four to five percent interest. The company then applied to the Interstate Commerce Commission to abandon most of the branch. Authority was granted in view of the prospective compulsory expenditure, the Commission finding that the public interest in continued service was insufficient to warrant a denial of the certificate to abandon.

The Long Island Railroad prior to its application to the Commission had probably incurred deficits in operating the branch in question (284 U. S. 369); but the important consideration moving the Commission's action was plainly the future expenditure to comply with the order of the New York regulatory authority.[10] This Court, in sustaining the Commission's decision, stated:

> * * * It was found that the expenditure for removal of grade crossings would, in the circumstances, be a waste of the company's funds, and that the requirement of the State Transit Commission removed all doubt of the propriety of abandonment of the branch. The magnitude of the required outlay as compared with the value of the whole property, and the resulting effect on the com-

[10] In cases similar to the present the Commission has not regarded past profitable operations as precluding a present authorization to abandon. *Cisco & Northeastern Ry.* (F. D. No. 13449, January 28, 1942); *Southern Ry.*, 217 I. C. C. 764; *Boston & Albany R. R.*, 202 I. C. C. 555.

> pany's revenue, were facts properly taken into account in passing on the application. * * *.
>
> In reaching these conclusions the Commission considered the needs of the communities served, and gave due regard to them * * *. [284 U. S. 368.]

In balancing the considerations favoring and opposing abandonment, the Commission makes an expert appraisal of the transportation situation with respect to the requirements of public convenience and necessity; its judgment should not be set aside unless it is arbitrary and unreasonable or has been reached on an erroneous theory of law.

II

EXPENSES ENTAILED BY RELOCATION OF THE CONFLUENCE AND OAKLAND RAILROAD WOULD BE SO GREAT AS TO WARRANT UNCONDITIONAL ABANDONMENT OF THE LINE

We think there would be no contest of the validity of the Commission's order authorizing abandonment without relocation in this case but for the contingency that the railroads may not be required to supply the cost of relocating the branch line to Kendall, Maryland. If the burdens of relocation were to fall wholly on the carriers, the facts are such as plainly to justify unconditional abandonment. Cf. *Transit Commission* v. *United States*, 284 U. S. 360.

The cost of the railroad, up to the end of 1936 had been approximately $400,000; at the same

time, the cost of reproduction, less depreciation, would have been $350,000. Its real property alone was worth less than $9,000; the United States arranged to buy the property for $306,000 plus salvage, which would be approximately $26,000. Relocation of the line would require an outlay estimated at $800,000 to $2,500,000. The Commission stated that it was not convinced of the accuracy of any of the estimates of construction cost submitted (R. 25); probably the actual cost of relocation would lie somewhere between the figures advanced by appellants on the one hand and by applicant railroads and the War Department on the other.

While the Confluence and Oakland branch considered alone operated at a loss during the years 1934 to 1939, movement of interline traffic over the branch [11] resulted in profits to the Baltimore and Ohio system. If, as contended by the carriers, the system cost of handling such traffic should be figured at about 75 percent of the system gross revenues from the traffic, net profits for the six years in question were $533, $95, $5,612, $3,016 (loss), $3,523 (loss), and $7,048 (R. 24); this produced average annual profits of $1,125 (R. 32). If an operating ratio of 50 percent were employed, the corresponding system net profits were $8,875, $8,634, $18,351, $9,018, $6,412, and $23,079 (R. 24); the annual average here was $12,395 (R. 32). If

[11] There was only negligible local traffic on the branch (R. 13, 22).

appellants' operating ratio of 25 percent were accepted the figures would have been $17,830, $17,406, $32,115, $20,567, $15,304, and $39,463 (R. 24); the average on this basis was $23,781 (R. 32).

The Commission did not adopt a particular construction cost or operating ratio; it assumed the figures most favorable to appellants and found that continued operation would not yield a reasonable return on the investment of capital in the line (R. 28); annual profits of $23,781 would amount to less than 3% on $800,000. This small income would very possibly be obliterated by increased maintenance costs on the relocated line; the railroads showed that maintenance expenditures would be permanently increased by $8,000 annually and for five years by an additional expense of $8,000 while the road underwent seasoning (R. 25); the protestants estimated the increase in maintenance expenditures even higher (R. 26).

More probably, the cost of relocation would be about $1,500,000, still considerably short of the estimates advanced by the applicant carriers; and adoption of a 50 percent operating ratio, frequently used in the present type of situation, would give a more accurate figure for the annual profit produced by the branch line. On the basis of those assumptions, the annual yield would scarcely exceed .8%; in absolute terms the calculated net profit would probably not exist at all, as a result of increased operating cost; rather the branch would operate

at a loss, even considered as part of the Baltimore and Ohio system.

The railroads could not secure capital to finance the relocation at any but a much higher rate than the most sanguine estimates of return. The resulting burden on the Baltimore and Ohio system in any case is evident.

During the five years before 1941 rail service on the Confluence and Oakland branch consisted of one mixed train in each direction semiweekly (R. 22). Passenger traffic has been very small, averaging less than 400 annually for the period 1934 to 1939 (R. 22). Freight traffic during the same period (R. 22–23) is summarized in the table appearing below.[12] The principal source of freight traffic was the coal shipments from appellant coal company's mine. The outbound shipments of coal for each year during the period 1934 to 1939 were, in order, 23, 230, 531, 451, 311, and 725 carloads (R. 23). It is apparent that in spite of consider-

[12]

Interline Freight *

Year	No. of Carload Shipments		Tons of Freight in less than Carload Shipments	
	Inbound	Outbound	Inbound	Outbound
1934	502	91	227	170
1935	196	285	326	21
1936	222	613	383	11
1937	201	525	381	27
1938	196	327	321	16
1939	194	735	249	32

* No local freight was handled (R. 22).

able fluctuation in volume [13] the outbound shipments of coal have become the only sustaining source of revenue to the line. While 343 carloads of contractors' equipment supplies, and road building material were handled over the line in 1934, since that time the volume has fluctuated from 49 carloads in 1935 to 94 in 1938 and 36 in 1939 (R. 22–23). Shipments of agricultural products have averaged only 53 carloads annually (R. 23). Incoming gasoline and oil shipments have declined steadily from 98 carloads in 1934 to 30 in 1939, and during the same period shipments of forest products declined from 55 to 9 (R. 23). Although the merchants of the largest town, Friendsville, use the line to the extent of approximately 40 carloads of freight annually, much of their merchandise is delivered by motor trucks and the railroad is only used for shipping heavy commodities such as feed and cement (R. 28).

The only towns of any size served by the branch line are Somerfield, Pennsylvania, eight miles from Confluence and Oakland Junction and having a

[13] Shipments averaged annually 27,211 tons from 1921 to 1933; 9,086 tons from 1933 to 1935; and 27,728 tons for 1936 and 1937. In 1938 the volume handled was 17,632 tons and in 1939 it was 40,243 tons (R. 26). Evidence before the Commission concerning the cause of the large increase in 1939 was conflicting (R. 16); Division 4 in its report merely stated that the applicants claimed that the increase resulted from a suspension of operations in the unionized bituminous coal fields during April and May of the year in question (R. 26).

population of 250, and Friendsville, Maryland, seventeen miles from the junction and having a population of 600. The total population within an area of one-half mile on either side of the line is estimated at 2,000. Some farming is carried on in the area, while lumbering has practically ceased owing to depletion of available timber. All mines along the line have been abandoned except that of McCullough Coal Corporation. Friendsville is served by a truck line operating out of Cumberland, Maryland. Although no other common carrier truck or bus service operates in the immediate territory, deliveries are made to all points by local and private trucks operating mainly out of Confluence and Somerfield. Improved state highways parallel the line at a substantial distance on each side, U. S. Highway 40 crosses it at Somerfield, and a paved state highway crosses it at Friendsville. Secondary roads traverse the area, affording connections with the highways. (R. 22.)

From these circumstances it is plain that aside from the requirements of the coal company there is virtually no public need for continuation of the Confluence and Oakland transportation service between the junction in Pennsylvania and Kendall, Maryland. Such use as there has been by local business of the branch railroad could be replaced by motor carriage without serious difficulty or inconvenience. We think also that the need of Mc-

Cullough Corporation for continued rail service is quite insufficient to overbalance the considerations opposing relocation. The Commission found that abondonment of the company's present railroad service would force closing of the coal mine, since transportation by motor truck to the nearest railhead would cost $1.12 per ton, making it impossible for McCullough to compete with more favorably located mines (R. 26). Thus, abandonment of the Confluence and Oakland will render McCullough's coal property largely worthless. The highest estimate placed on its value by any of the witnesses in the District Court was $308,262.13 (R. 46). Relocation would cost several times that sum.

Far from there being only substantial evidence to support the Commission's finding that public convenience and necessity will permit of unconditional abandonment, the administrative determination made was clearly correct. *United States Feldspar Corp.* v. *United States*, 38 F. (2d) 91 (N. D. N. Y.); cf. *Transit Commission* v. *United States*, 284 U. S. 360.

III

THE COMMISSION PROPERLY AUTHORIZED UNCONDITIONAL ABANDONMENT REGARDLESS OF WHETHER THE CARRIERS WOULD BE OBLIGED TO BEAR THE COST OF RELOCATION

Appellants urge that a different result must follow because appellee railroads may not have to pay the expense of relocation. The issue is one of

statutory construction of the words "public convenience and necessity"; if the Commission's interpretation, excluding consideration of the source of necessary capital for relocation, is in error, its order must be set aside and the proceeding before the Commission reopened for a new determination in accordance with the opposing principle. The Government urges, however, that the view of the statute taken by the Interstate Commerce Commission and by the District Court is right.

It is probable that where the land on which a public utility is located is taken by eminent domain the owner is constitutionally entitled to compensation from the condemnor for the cost of relocating its utility when relocation is essential. *Wayne County, Ky.*, v. *United States*, 53 C. Cls. 417, affirmed *per curiam*, 252 U. S. 574; *United States* v. *Wheeler Township*, 66 F. (2d) 977 (C. C. A. 8); *United States* v. *Town of Nahant*, 153 Fed. 520 (C. C. A. 1); cf. *Panhandle Eastern Pipe Line Co.* v. *State Highway Commission*, 294 U. S. 613. Section 2 of the Act of June 28, 1938, c. 795, 52 Stat. 1215–1216, makes provision for paying the cost of utility relocation where the Secretary of War acquires land in the name of the United States for projects covered by the statute. However, there is obviously no constitutional requirement that the United States pay relocation damages to a condemnee if the latter need not relocate; and presumably public funds would not in such a case be

available under the statute to reimburse a railroad for hypothetical and nonessential relocation. Here, as evidenced by the option obtained by the War Department, it is clear that the carriers will not relocate the Confluence and Oakland line unless required by the Interstate Commerce Commission. Reimbursement from the United States for relocation is therefore dependent upon the Commission's decision. If, in the abandonment proceedings, that reimbursement is assumed as certain, escape is effected from the logical circle only arbitrarily and a decision against abandonment rests wholly on the thing assumed. Accordingly, we submit that a determination on unconditional abandonment should be made without regard to the prospect of government indemnity for the cost of relocation; this the Commission did.

The majority ruled that wasteful expenditures to enable continuance of service by a branch railroad would not serve the public convenience and necessity, even if the waste entailed would fall upon the general public instead of the carriers. One of the chief objects of the Transportation Act of 1920 was "to secure the avoidance of waste." See *Texas* v. *United States*, 292 U. S. 522, 530; *Georgia* v. *United States*, 28 F. Supp. 749, 750. In *The New England Divisions Case*, 261 U. S. 184, 189, 190, the Court referred to the Commission's new power under that Act to authorize abandonment of unprofitable and unnecessary lines as a means of insuring adequate transportation serv-

ice."[14] The Transportation Act of 1940 was enacted in general amendment of the statutes administered by the Interstate Commerce Commission, consolidating them in a revised Interstate Commerce Act. The revision was opened with the following statement of policy:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; * * *. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy (c. 722, 54 Stat. 899).

It is true that an important purpose of the Interstate Commerce Act as amended was the protection of the financial stability of railroads in order that they might serve the public need efficiently; but we submit that while this may be a minimum re-

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[14] In *Chesapeake & Ohio Ry.* v. *United States*, 283 U. S. 35, the Court said concerning paragraphs 18 to 22 of section 1:

"Undoubtedly the purpose of these provisions is to enable the Commission, in the interest of the public, to prevent improvident and unnecessary expenditures for the construction and operation of lines not needed to insure adequate service." [283 U. S. 42.]

quirement it is not the maximum set by the statutory standard of public convenience and necessity. *Colorado* v. *United States*, 271 U. S. 153, 169. In the previously decided case most closely resembling the present suit a statutory court of three judges found no difficulty in sustaining the Commission's order approving abandonment even though the burden of relocation would not fall on the railroad;[15] in fact, the cost of relocating had there already been paid unconditionally to the carrier by the state condemnor. *United States Feldspar Corp.* v. *United States*, 38 F. (2d) 91 (N. D. N. Y.).

Expenditure of the sum required to relocate the branch railroad involved in the present case is not justified by public demand for the service. Preservation of transportation facilities under such circumstances is not less wasteful with respect to economical operation of the national transportation system as a whole because public funds, rather than those of a carrier, are expended for the purpose.

CONCLUSION

The Interstate Commerce Commission properly authorized unconditional abandonment by the applicant railroads of the Confluence and Oakland

[15] In *Transit Commission* v. *United States*, 284 U. S. 360, the New York authority requiring elimination of grade crossings was to pay one-half of the cost.

branch line. It is therefore respectfully submitted that the decree of the District Court dismissing the complaint was correct and should be affirmed.

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APPENDIX

Section 1 (18) of the Interstate Commerce Act, as amended (U. S. C. title 49, sec. 1 (18)), provides:

> No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 of this title shall be considered to prohibit the making of contracts between carriers by railroad subject to this chapter, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

Section 1 (20) (U. S. C. title 49, sec. 1 (20)), provides:

> The commission shall have power to issue such certificate as prayed for, or to refuse to

issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

Section 1 (21) (U. S. C. title 49, sec. 1 (21)), provides:

The commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this chapter, party to such pro-

ceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this chapter, and to extend its line or lines: *Provided,* That no such authorization or order shall be made unless the commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this chapter which refuses or neglects to comply with any order of the commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

Section 2 of the Act of June 28, 1938, c. 795, 52 Stat. 1215–1216, provides, in part:

That in case of any dam and reservoir project, or channel improvement or channel rectification project for flood control, herein authorized or heretofore authorized by the Act of June 22, 1936 (Public, Numbered 738, Seventy-fourth Congress), as amended, and by the Act of May 15, 1928 (Public, Numbered 391, Seventieth Congress) as amended by the Act of June 15, 1936 (Public, Numbered 678, Seventy-fourth Congress), as amended, title to all lands, easements, and rights-of-way for such project shall be acquired by the United States or by States, political subdivisions thereof or other responsible local agencies and conveyed to the United States, and provisions (a), (b), and (c) of section 3 of said Act of June 22, 1936,

shall not apply thereto. Notwithstanding any restrictions, limitations, or requirement of prior consent provided by any other Act, the Secretary of War is hereby authorized and directed to acquire in the name of the United States title to all lands, easements, and rights-of-way necessary for any dam and reservoir project or channel improvement or channel rectification project for flood control, with funds heretofore or hereafter appropriated or made available for such projects, and States, political subdivisions thereof, or other responsible local agencies, shall be granted and reimbursed, from such funds, sums equivalent to actual expenditures deemed reasonable by the Secretary of War and the Chief of Engineers and made by them in acquiring lands, easements, and rights-of-way for any dam and reservoir project, or any channel improvement or channel rectification project for flood control heretofore or herein authorized: *Provided,* that no reimbursement shall be made for any indirect or speculative damages: *Provided further,* That lands, easements and rights-of-way shall include lands on which dams, reservoirs, channel improvements, and channel rectifications are located; lands or flowage rights in reservoirs and highway, railway, and utility relocation.